Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT C. KONOP,

Petitioner,

v.

HAWAIIAN AIRLINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT C. KONOP, Plaintiff, v. HAWAIIAN AIRLINES, INC., Defendant.	CV 96-4898 JSL JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT, FOR SANCTIONS, AND FOR PRELIMINARY INJUNCTION; DENYING DEFENDANT'S MOTION FOR SANCTIONS; AND DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed Feb. 6, 1997)

The motions of plaintiff Robert C. Konop for partial summary judgment, for sanctions, and for a preliminary injunction, and the motions of defendant Hawaiian Airlines, Inc. for summary judgment and for sanctions came for hearing regularly on February 3, 1997. Having exhaustively reviewed all the papers filed in connection with this matter, having heard oral argument, and being fully apprised of the relevant facts and law, IT IS HEREBY ORDERED AND ADJUDGED that the motions for partial summary judgment, for sanctions and for preliminary injunction of plaintiff Robert C. Konop be DENIED. IT IS FURTHER ORDERED AND ADJUDGED that the motion for sanctions of defendant Hawaiian Airlines, Inc. be DENIED and that the motion for summary judgment of

defendant Hawaiian Airlines, Inc. be GRANTED IN PART AND DENIED IN PART.

In all his papers before the Court, plaintiff raises one material issue of fact which survives defendant's motion for summary judgment. This issue is whether, by placing plaintiff on sick leave on July 19, 1997, defendant acted in retaliation against plaintiff for his union-organizing activity. While this issue survives summary judgment, a preliminary injunction is not proper because the Court finds no irreparable injury for which legal remedies are inadequate, *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987), and the balance of hardships, as well as plaintiff's chances for success on the merits of this issue, *Regents of the University of California v. ABC, Inc.*, 747 F.2d 511, 515 (9th Cir. 1984), warrant against the issuance of a preliminary injunction in this case.

Plaintiff's remaining tort claims, unfair labor practices claims, and claims under the Railway Labor Act ("R.L.A.") are preempted by arbitration because they call for an interpretation of provisions of the collective bargaining agreement. *See Hawaiian Airlines v. Norris*, 512 U.S. 246, 114 S.Ct. 2239, 2243-44 (1994) (disputes growing out of the interpretation or application of the collective bargaining agreement are subject to the R.L.A.'s mandatory arbitral mechanism). To the extent these claims are not so preempted, they either fail as a matter of law or plaintiff has failed to create any material issue of fact to support them.

Finally, plaintiff's claim under the Electronic Communication Privacy Act ("E.C.P.A."), 18 U.S.C. §§ 2701 et seq.[1], fails because defendant accessed plaintiff's website with the consent of two other pilots. 18 U.S.C. § 2701(c)(2). The language appearing in plaintiff's website purporting to restrict access does not alter this conclusion because it conflicts with the statutory language allowing users to consent to access by others. Section 2701(c)(2) allows access to a facility providing an electronic communications service, such as plaintiff's website, if consented to by "a user of that service with respect to a communication of or intended for that user." To the extent plaintiff's restrictions purported to prohibit the users of his website from consenting to access by others, the language was in conflict with this statute and is thus unenforceable.[2]

Were the Court to conclude that plaintiff's E.C.P.A. claim was valid, only the minimum statutory penalty – one thousand dollars plus costs and attorney's fees – would apply to this case. This is because there is no evidence of actual damages to the plaintiff or of profit made by the defendant, 18 U.S.C. §§ 2707(b) and (c), and an act as to which the Court erred in its interpretation of the law could not be deemed sufficiently outrageous to

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[1] The Court concludes that Title II, and not Title I, 18 U.S.C. §§ 2510 et seq., of the E.C.P.A. applies to plaintiff's claims.

[2] The Court notes that plaintiff's restrictions would not be enforced by the Court, even if not in conflict with the statute, as the language is precatory. The website states that the user "must agree", not that the user *does* agree, to the conditions. Additionally, it states that "anyone found to disseminate this information" will be liable, and not that anyone who actually disseminates the information will be liable.

support a claim for the intentional infliction of emotional distress.

The Court may amend or amplify this order with a more specific statement of the grounds for its decision.

IT IS SO ORDERED AND ADJUDGED.

Dated: _____ /s/ J. Spencer Letts
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT C. KONOP, Plaintiff, v. HAWAIIAN AIRLINES, INC., Defendant.	CV 96-4898 JSL (JGx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Aug. 20, 1997)

Having heard the testimony of the witnesses and evaluated their credibility, reviewed and considered the entire record of this case, received and considered the exhibits, and heard the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendant Hawaiian Airlines, Inc. ("Hawaiian") hired the plaintiff Robert C. Konop as an airline pilot in 1985, and he has been employed there continually at least until the date of the conclusion of the trial of this matter, February 27, 1997.

2. In late 1995, Hawaiian commenced negotiations with the Air Line Pilots Association ("ALPA") over proposed wage concessions to their existing collective bargaining agreement (the "Pilots Basic Agreement"), as well as with the three other principal labor unions representing Hawaiian employees. Hawaiian was experiencing financial difficulties and these wage concessions were a condition imposed by a potential investor. In December 1995,

Hawaiian reached, subject to ratification, tentative revised labor agreements with its unions.

3. Konop is a dues-paying non-member of ALPA.

4. Konop made known, through a newsletter, his opposition to the proposed wage concessions, his dissatisfaction with ALPA and his desire to possibly bring in a union other than ALPA to represent Hawaiian pilots.

5. The Pilots Basic Agreement includes specific provisions outlining the grievance procedures to be followed for both non-disciplinary and disciplinary claims and establishes the Hawaiian System Board of Adjustment ("System Board") to adjudicate all such claims.

6. Pursuant to Sections 16 and 17 of the Agreement, a grievance may be brought before the System Board in three ways: (1) by ALPA as a group grievance; (2) by ALPA on behalf of an individual pilot; or (3) by the individual pilot himself or herself.

7. Pursuant to the requirements of the Railway Labor Act ("RLA"), Section 17 of the Pilots Basic Agreement also sets forth the procedures for the establishment of the System Board itself, which is to consist of three members. One member is selected by ALPA and one member is selected by Hawaiian. The third member is taken in rotating order from a panel of three neutral arbitrators selected by Hawaiian and ALPA. Neutral arbitrator Howard Block was a member of this panel.

8. On or about April 18, 1996, Captain Ralph Godbe called Hawaiian's Vice President of Flight Operations, James Davis, and complained that Konop, who had flown as Godbe's co-pilot routinely failed to comply with certain standard operating procedures in the cockpit regarding

the radio altimeter and plotting. Godbe told Davis that he refused to fly with Konop.

9. In response to Godbe's complaint, Davis contacted Konop, who agreed to follow standard operating procedures. Davis thereafter received a second complaint from Godbe about Konop in which Godbe stated that he would not fly with Konop. On April 29, 1996, Davis received another call from Godbe complaining about Konop.

10. On April 29, 1996, based on the complaints of Godbe, Davis initiated pre-disciplinary proceedings against Konop pursuant to Section 16.b of the Pilots Basic Agreement. Konop, however, would not respond to Davis; phone messages and written communications were ignored and Konop failed to pick up his mail.

11. A Company hearing was ultimately held which Konop did not attend. Davis concluded that formal discipline would not be appropriate under the circumstances. Konop filed a grievance over the issue with the System Board over which an arbitration hearing was held on October 8, 1996. System Board Chairman Howard Block has closed the record.

12. On July 12, 1996, Konop filed the instant lawsuit, asserting, among other things, that Hawaiian had violated federal laws when it accessed information he was distributing to pilots over the Internet and retaliated against him in various ways in violation of the Railway Labor Act because of his opposition to wage concessions and his union-organizing efforts. The Complaint also alleged that Konop was suffering, and continues to suffer, from severe emotional distress, discomfort, anxiety and humiliation as a result of Hawaiian management's purported conduct toward him.

13. When they read Konop's representations in the Complaint that he continues to suffer from "severe emotional distress" as a result of Hawaiian's conduct towards him, Hawaiian management became concerned for safety reasons with Konop's continuing to fly.

14. After reviewing the matter with its legal department, and out of concern for public safety, Hawaiian determined that further medical information should be obtained before Konop would be released to fly.

15. By letter dated July 19, 1996, Davis advised Konop that he was being removed from flight duty and placed on sick leave until he completed fitness-for-duty examinations conducted by an FAA-certified physician, Dr. Jack Scaff, and a psychiatrist, Dr. Craig Robinson.

16. Konop refused to take the examinations. Instead, he filed an application for a Temporary Restraining Order with the Court, which was denied. Konop then filed a grievance over this management decision as well. The grievance proceeded to final adjudication before the System Board on October 9, 1996, in Honolulu, before Chairman Howard Block. The Board considered evidence regarding Konop's contention that Hawaiian's insistence on medical and psychiatric examinations was not only a violation of the Pilots Basic Agreement, but also a pressure tactic taken in retaliation for Konop's opposition to the proposed wage concessions and his participation in certain protected activities.

17. Konop represented himself. ALPA's chief legal counsel, Everett Barber, was present at the hearing and available to Konop if he desired Barber's assistance.

18. A majority of the System Board concluded that Hawaiian was justified under management's rights implied in the Pilots Basic Agreement in requesting the fitness-for-duty examinations because of its safety concerns, and that Hawaiian did not violate the Pilots Basic Agreement or the Federal Aviation Regulations encompassed by the Agreement in so doing. ALPA's representative on the Board dissented.

19. In December 1996, Konop filed his First Amended Complaint in this action in which he added allegations that Hawaiian's conduct in removing him from flight duty and placing him on sick leave was done in retaliation for his opposition to wage concessions and union-organizing efforts and was in violation of the Railway Labor Act.

20. As a result of the Court's rulings on the parties' cross-motions for partial summary judgment, the only claim remaining in this action is Konop's claim that Hawaiian retaliated against him in violation of the Railway Labor Act, 45 U.S.C. § 152 (Fourth) and intentionally caused him emotional distress when it removed him from active duty and placed him on sick leave until he completed fitness-for-duty exams.

Based on the foregoing Findings of Fact, the Court now makes its:

CONCLUSIONS OF LAW

A. <u>This Court Id Without Jurisdiction To Hear Konop's Claims.</u>

1. The Railway Labor Act ("RLA") contains an exclusivity provision, which establishes a *mandatory* arbitral

mechanism for the prompt and orderly settlement of two classes of disputes: minor disputes and major disputes. 45 U.S.C. § 151a.

2. "Minor" disputes involve controversies over duties and rights created or defined by an existing collective bargaining agreement. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 129 L. Ed. 2d 203 (1994).

3. In the airline industry, *exclusive* jurisdiction to resolve "minor" disputes is vested in a System Board of Adjustment through arbitration after negotiation between the parties fails. Accordingly, a court is without jurisdiction to entertain any claim determined to be a "minor" dispute within the meaning of the RLA. 45 U.S.C. § 153, 181, 184-185; *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562, 107 S. Ct. 1410, 1414, 94 L. Ed. 2d 562 (1987).

4. A claim is preempted by the RLA as a "minor" dispute subject to mandatory arbitration if it relies on the interpretation of a provision of the collective bargaining agreement ("CBA"); if the claim is brought under state or federal law without any reference to the CBA, then it is not preempted. *Norris*, 129 L. Ed. 2d at 215-18.

5. A claim is a "minor" dispute when it is "inextricably intertwined with consideration of the terms of the labor contract." *Fry v. Airline Pilots Association International*, 88 F. 3d 831, 836 (10th Cir. 1996). Moreover, a claim is a minor dispute if it "depend[s] not only on a right found in the CBA, but also if [it] implicate[s] practices, procedures, implied authority, or codes of conduct that are part of the working relationship." *Id.*

6. The RLA also protects employees' rights of self-organization. An employer may not retaliate against an employee who engages in certain "protected" activities such as union-organizing efforts. 45 U.S.C. § 152 (Fourth).

7. Under the same analysis applied to determine whether the RLA preempts state law claims, an employee may assert a private right of action under § 152 (Fourth) only where the allegations supporting the claim are not grounded in the collective bargaining agreement. Courts, however, do not have jurisdiction over a statutory claim of alleged interference or retaliation in violation of § 152 where the claim concerns the interpretation of a collective bargaining agreement. Again, such a claim is a "minor" dispute subject to the RLA's mandatory arbitration provisions. *Machinists v. Alaska Airlines*, 813 F. 2d 1038 (9th Cir. 1987).

8. Konop's retaliation claim under the Railway Labor Act, 45 U.S.C. § 152 (Fourth) and his emotional distress claim are "minor" disputes because they are predicated on the First Amended Complaint's alleged violations of the terms of the Pilots Basic Agreement. (FAC ¶¶ 34, 35, 36, 39, 41, 42, 47, 49) *See, e.g., Jimeno v. Mobil Oil Corp.*, 66 F. 3d 1514, 1526 (9th Cir. 1995). Moreover, as the Systems Board did in adjudicating Konop's grievance, in coming to the merits of Konop's claims the Court would be required to determine if Hawaiian's actions were permitted under the Pilots Basic Agreement, Federal Aviation Regulations encompassed within the Agreement and management's reserved rights implied in the Agreement.

9. Konop's allegations have, in fact, been the subject of a grievance already arbitrated before the System Board

and resolved in Hawaiian's favor. *See Fennesey v. Southwest Airlines*, 91 F. 3d 1359, 1361 (9th Cir. 1996) (court has jurisdiction to hear RLA claim that plaintiff was discharged in retaliation for union organizing efforts where retaliation *not* raised or asserted as part of arbitration proceeding over discharge before System Board of Adjustment).

10. Konop's claims are, therefore, "minor" disputes subject to mandatory arbitration because they are "inextricably intertwined" with the consideration of the terms of the current collective bargaining agreement and "implicate practices, procedures, implied authority and codes of conduct that are part of the working relationship" addressing safety and sick leave status. *Fry v. Airline Pilots Association International*, 88 F.3d 831 (10th Cir. 1996).

11. Konop's status as a non-member of ALPA has no bearing on whether this Court has jurisdiction to hear his claim. The duly elected union – ALPA – has the exclusive authority to represent all employees in the collective bargaining agreement – whether or not the employees elect to become union members. 45 U.S.C. § 152 (Second); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 113 L. Ed. 2d 51, 111 S. Ct. 1127, 1135 (1991); *Nellis v. Air Line Pilots Ass'n*, 805 F. Supp. 355, 357 (E.D. Val. 1992).

12. Accordingly, both Konop's Railway Labor Act claim and intentional infliction of emotional distress claim fail because they constitute "minor disputes," with respect to which this Court is without jurisdiction.

B. Konop Was Not Denied Due Process.

13. Konop has not, by this action, challenged the Board's decision in favor of Hawaiian on the grounds that it was in any way unfair. Nor would such a challenge succeed.

14. Review of an arbitration award under the RLA is "among the narrowest known to the law." *Pacific & Arctic Ry. v. United Transportation Union*, 952 F. 2d 1144, 1147 (9th Cir. 1991). Mere disagreement with the Board's decision does not permit a district court to substitute its views for those of the Board. *Dement v. Richmond Fredericksburg & Potomac Railroad Co.*, 845 F. 2d 451, 459 (4th Cir. 1988).

15. To the contrary, the RLA expressly limits judicial review of such awards to whether (1) the board failed to comply with the Act, (2) the board failed to confine itself to matters within its jurisdiction, and (3) the board or parties used fraud or corruption to obtain the award. *Id.* at 1147; 45 U.S.C. § 153 (First) (q). Konop has failed to present sufficient evidence as to any of these factors.

16. Courts also have recognized due process as a valid consideration upon which a federal court has jurisdiction to review decisions of a system board of adjustment. *Edelman v. Western Airlines, Inc.*, 892 F. 2d 839, 847 (9th Cir. 1989).

17. A plaintiff waives his right to challenge a decision on due process grounds, however, where, as here, he has not raised it before the board. *Id.* at 847-48; *see also Shafii v. British Airways*, 872 F. Supp. 1178, 1181-82 n.2 (E.D.N.Y. 1995), *aff'd* 71 F. 3d 404 (2nd Cir. 1995), *cert. denied*, ___ U.S. ___, 134 L. Ed. 2d 656 (1996).

C. Konop's Retaliation Claim Fails On the Merits.

18. Notwithstanding the foregoing findings, the Court will address the merits of Konop's retaliation claim. Konop must prove by a preponderance of the evidence not only that he engaged in a "protected" activity under the RLA, but that this activity was a substantial or motivating factor in Hawaiian's decision to remove him from flight duty and place him on sick leave. *N.L.R.B. v. Mike Yurosek & Son, Inc.*, 53 F. 3d 261, 267 (9th Cir. 1995); *Roscello v. Southwest Airlines Co.*, 726 F. 2d 217, 222-23 (5th Cir. 1984).

19. Konop has failed to sustain his burden of proof. He has failed to proffer sufficient evidence that Konop's allegedly protected activity was a substantial or motivating factor in Hawaiian's decision to remove Konop from flight duty and place him on sick leave. Should he have made a sufficient showing, the burden shifts to Hawaiian to demonstrate that it would have taken this action regardless of his "protected activity." *N.L.R.B. v. Mike Yurosek & Son, Inc.*, 53 F. 3d at 267.

20. In any event, Hawaiian has established that it had a legitimate safety concern in taking the actions that it did and that it would have taken the same actions regardless of Konop's efforts to bring in another union.

D. Konop's Claim of Intentional Infliction of Emotional Distress Fails As A Matter of Law.

21. Notwithstanding the foregoing findings, Konop's claim of intentional infliction of emotional distress is precluded by the exclusivity provisions of California Workers' Compensation Act (the "Act"), which provides the

exclusive remedy to an employee for injuries (including emotional distress) arising out of and in the course of employment, and this liability "is in lieu of any other liability whatsoever." Cal. Labor Code § 3600

22. Claims for physical or emotional injury are within the exclusive jurisdiction of the Act when they are based on conduct "normally occurring in the workplace." This is the case whether or not the employee alleges improper or illegal motives on the part of the employer. *Livitsanos v. Superior Ct.*, 2 Cal. 4th 744, 752 (1992); *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 151 (1987).

23. Hawaiian's conduct in removing Konop from flight duty and placing him on sick leave was not outside the normal part of the employment relationship.

24. Furthermore, in order to establish a viable claim for intentional infliction of emotional distress under California law, the plaintiff must show, *inter alia*, that the defendant's conduct was extreme and outrageous. *Cervantez v. J.C. Penney Co., Inc.*, 24 Cal. 3d 579, 593-94, 156 Cal. Rptr. 198 (1979); *Mintz v. Bell Atlantic*, 183 Ariz. 550, 905 P.2d 559, 562-63 (Ariz. Ct. App. 1995).

25. California follows the test set forth in the Restatement (Second) of Torts for "extreme and outrageous" conduct:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. . . . *The liability clearly does not extend to mere insults, indignities, threats, annoyances,*

> *petty oppressions, or other trivialities.* [emphasis added]

Restatement (2d) of Torts, Section 46, comment (d); *Mintz*, 905 P. 2d at 562-63; *Yurick*, 209 Cal. App. 3d at 1123.

26. Hawaiian's conduct does not rise to the requisite level of "outrageousness". *See, e.g., Yurick*, 209 Cal. App. 3d 116 (1989) (repeatedly calling employee "senile" and a "liar" does not rise to the necessary level of "outrageousness"); *Schneider v. TRW, Inc.*, 983 F. 2d 986 (9th Cir. 1991) (yelling and screaming while criticizing work is not, by itself, "outrageous").

27. To the extent that any foregoing finding of fact is deemed to constitute a conclusion of law, or vice versa, it shall be construed as such.

IT IS SO ORDERED.

DATED: 8/20/97

/s/ Spencer Letts
J. Spencer Letts
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT C. KONOP, Plaintiff, v. HAWAIIAN AIRLINES, INC., Defendant.	CV 96-4898 JSL AMENDED JUDGMENT (Filed Nov. 12, 1998)

Plaintiff Robert Konop's sole remaining claim in this action for retaliation in violation of the Railway Labor Act, 45 U.S.C. § 152, came on trial before this Court on February 27, 1997. The issues having been duly tried, having reviewed the papers filed in connection with this matter, and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. This Court is without jurisdiction to hear plaintiff's claim pursuant to the Railway Labor Act's exclusivity provision requiring mandatory arbitration before the Hawaiian System Board of Adjustment.

2. In the alternative, defendant Hawaiian Airlines, Inc. did not retaliate against plaintiff in violation of the Railway Labor Act, 45 U.S.C. § 152.

IT IS SO ORDERED.

DATED: 11/12/98

/s/ Spencer Letts
J. Spencer Letts
United States District Judge